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THE FIRST HAYBURN CASE, 1792

THE right of a judicial court to declare void an enactment of the legislature that is repugnant to the instrument of government, from which both legislature and court receive their sanction, has been a subject of perennial interest and continued discussion. In particular, the origin of the right of the Supreme Court of the United States to declare an act of Congress to be invalid because it is contrary to the Federal Constitution has been and still is a mooted question.[1]

It will be remembered that the Invalid Pension Act of March 23, 1792, directed the federal circuit courts to receive and sit in judgment upon applications for pensions for disabilities incurred in service in the Revolutionary War. Their decisions were to be submitted to the Secretary of War, and if disapproved by him were to be reported to Congress at their next session. Within two weeks (April 5, 1792), Chief Justice Jay, Associate Justice Cushing and District Judge Duane, in the circuit court for the district of New York, took this act into consideration and formally entered their opinion upon the record:[2]

"That neither the legislative nor the executive branches can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner:—

"That the duties assigned to the circuit courts by this act are not of that description; and that the act itself does not appear to contemplate them as such, inasmuch as it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the secretary at war, and then to the revision of the legislature."

They avoided the direct issue of its constitutionality, however, by further declaring:

"As therefore the business assigned to this court by the act is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purposes

[1] For recent discussion of this subject see William M. Meigs, "Some Recent Attacks on the American Doctrine of Judicial Power", *American Law Review*, September–October, 1906, 641–670.

[2] Carey's *American Museum* (1792), XII. Appendix 2.

mentioned in it by official instead of personal descriptions. . . .

"That as the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of congress, and as the judges desire to manifest on all proper occasions, and in every proper manner, their high respect for the national legislature, they will execute this act in the capacity of commissioners."

They accordingly acted in this capacity, but by way of protest forwarded on April 10 to President Washington their opinion as voiced in the extracts from the minutes and requested that he communicate these to Congress. A similar position was taken by Associate Justice Iredell and District Judge Sitgreaves of the circuit court for the district of North Carolina, and embodied in a letter of June 8 to the President.[3] The judges on the middle circuit took a more radical stand, but their action will be considered in another connection in this article.

At the next session of Congress the objectionable features of the Act of 1792 were repealed and an acceptable mode of procedure upon pension-claims adopted. One section of this repealing act made it "the duty of the Secretary of War, in conjunction with the Attorney General, to take such measures as may be necessary to obtain an adjudication of the Supreme Court of the United States, on the validity of any such rights claimed under the act aforesaid, by the determination of certain persons styling themselves Commissioners."

In accordance with this latter provision a friendly suit was brought in the Supreme Court by the United States against Yale Todd to recover money paid under a pension granted him upon the finding of Jay, Cushing and Law, judges of the circuit court for the district of Connecticut, acting as commissioners. February 12, 1794, the Supreme Court—with Chief Justice Jay, Associate Justices Cushing, Wilson, Blair and Paterson present—rendered a decision against Yale Todd. The case is involved in some obscurity, since the only report is in a note appended to *United States* v. *Ferreira* (13 Howard, 52) by order of Chief Justice Taney in 1851. According to this note "the result of the opinions expressed" was that the power proposed to be conferred upon the circuit courts by the Act of 1792 was unconstitutional, and that statement has been rather generally interpreted into the direct statement that the Supreme Court declared the Act of 1792 unconstitutional. Professor Thayer, however, was probably right in his assertion that the court did not formally declare the act unconstitutional; it was rather a decision

[3] *Annals of Congress*, Second Congress, 1319–1322.

that the theory of the legislation of March 23, 1792, adopted by some of the judges, *viz.*, that it gave them authority to act as commissioners, was untenable.[4] A search through the records of the Supreme Court shows that the original papers of *United States* v. *Yale Todd* are missing, but an examination of *United States* v. *Ferreira* papers reveals an attested transcript of the record of the Yale Todd case, according to which the court simply declared its opinion "that Judgement be Entered for the Plaintiff".[5] It is altogether probable then that the court avoided the issue.

Shortly after Jay and his associates had sent their letter of protest to the President in 1792, Associate Justices Wilson and Blair and District Judge Peters of the circuit court for the district of Pennsylvania also addressed a letter to the President under date of April 18, declaring "the sentiments, which, on a late painful occasion, governed us, with regard to an act passed by the legislature of the union. . . . Upon due consideration, we have been unanimously of opinion, that, under this act, the circuit court, held for the Pennsylvania district, could not proceed; . . . Be assured, that, though it became necessary, it was far from being pleasant. To be obliged to act contrary either to the obvious directions of congress, or to a constitutional principle, in our judgment, equally obvious, excited feelings in us, which we hope never to experience again."[6]

The "painful occasion" referred to was the action of the court just one week previous upon the application of William Hayburn for a pension under the Act of 1792. The following record is copied from the docket of the court:

"At a Circuit Court of the United States in and for the Pennsylvania District, etc.

11th day of April, 1792, before Wilson, Blair and Peters.

The petition of William Hayburn, was read and after due deliberation thereupon had it is considered by the Court that the same be not proceeded upon."

This action, which it has seemed advisable to call the "first Hayburn case", has been obscured by the Hayburn case before the Federal Supreme Court at the August term, 1792, when Attorney-General Randolph moved for a *mandamus* to the circuit court for the district of Pennsylvania, commanding it to proceed and hear the petition of Hayburn—a motion which the court held under advisement until Congress had modified the objectionable features of the

[4] J. B. Thayer, *Cases on Constitutional Law*, I. 105 n.

[5] The writer is indebted to Mr. James D. Maher for the courteous assistance rendered him in examining these papers.

[6] Carey's *American Museum* (1792), XII. Appendix 2.

statute, as noticed above, and upon which no return was ever made.[7] The record of the first Hayburn case is so meagre that no importance would seem to attach to it, were it not for the light which is thrown upon it from other sources.

On April 13, 1792, a memorial from Hayburn was presented to the House of Representatives setting forth the refusal of the circuit court to take cognizance of his case and asking for relief. "This being the first instance in which a court of justice had declared a law of Congress to be unconstitutional, the novelty of the case produced a variety of opinions with respect to the measures to be taken on the occasion."[8] This quite explicit statement carries additional weight from the fact that it is based upon the explanation given to the House by Elias Boudinot, of New Jersey, who apparently had been sufficiently interested to have attended court on that day or to have acquired definite information from some source; and Boudinot was a competent authority, for he had been attorney for the plaintiffs in the case of *Holmes* v. *Walton* in New Jersey in 1780.[9]

James Wilson was, of course, the dominating personality of the trio of judges who had refused to proceed under an act of Congress. In the Federal Convention he had intimated, and in the Pennsylvania State Convention upon the ratification of the Constitution, he had unequivocally declared his position:

"If a law should be made inconsistent with those powers vested by this instrument in Congress, the Judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void. For the power of the constitution predominates. Anything, therefore, that shall be enacted by Congress contrary thereto, will not have the force of law."[10]

It is not surprising then to find Iredell, who was on circuit with Wilson in the fall of 1792, writing to his wife: "We have had a great deal of business to do here, particularly as I have reconciled myself to the propriety of doing the Invalid-business out of Court. *Judge Wilson altogether declines it.*"[11]

The newspapers of the day indicate that not a little interest was aroused by the first Hayburn case. Some praised the action

[7] 2 Dallas, 409.

[8] *Annals of Congress,* Second Congress, 556–557.

[9] Scott Austin, *Holmes vs. Walton; the New Jersey Precedent*; AMERICAN HISTORICAL REVIEW, IV. 456–469.

[10] McMaster & Stone, *Pennsylvania and the Federal Constitution,* p. 354.

[11] McRee, *Life and Correspondence of James Iredell,* II. 361.

of the judges and one correspondent hoped "that they may do the same with the National Bank".[12] Many sympathized with the applicants for pensions and regretted that the "humanity of Congress has been thwarted by the action of the judges".[13] Others regarded the action of the judges as unconstitutional, and impeachment was even threatened. The following extract from Bache's *General Advertiser* of April 20, 1792, shows that some excitement evidently prevailed: "Never was the word 'impeachment' so hackneyed, as it has been since the spirited sentence passed by our judges on an unconstitutional law. The high-fliers, in and out of Congress, and the very humblest of their humble retainers talk of nothing but impeachment! impeachment! impeachment! as if forsooth Congress were wrapped up in the cloak of infallibility, which has been torn from the shoulders of the Pope; and that it was damnable heresy and sacrilege to doubt the constitutional orthodoxy of any decision of theirs, once written on calf-skin!"

In Freneau's *National Gazette* for April 23, it was stated: "We agree . . . that humanity is better pleased with the conduct of the judges of the Eastern circuit; but . . . they too have, though in a delicate manner passed sentence of unconstitutionality on the invalid law.—We . . . assert that the word 'impeachment' was several times mentioned in the House of Representatives although no motion was made on the subject." In the same paper there appeared on May 10 a summary of the work of Congress during the session; it was said therein: "The decision of the judges against the constitutionality of an act in which the executive had concurred with the legislative departments, is the first instance, also, in which that branch of the government has withstood the proceedings of the others."

In view of all these things there would seem to be no reasonable doubt that on April 11, James Wilson, John Blair and Richard Peters declared the Invalid Pension Act of 1792 unconstitutional. Inasmuch as the docket of the court does not state this specifically and we have no opinion filed, lawyers may still hold that *Van Horn's Lessee* v. *Dorrance* in 1795[14] is the first of which we have official record, but to the historical student the evidence would seem to be fairly conclusive that James Wilson and his associates anticipated that decision by three years in the "first Hayburn case".

MAX FARRAND.

[12] *The Mail; or Claypoole's Daily Advertiser*, April 16, 1792.
[13] Fenno's *Gazette of the United States*, May 9, 1792.
[14] 2 Dallas, 304.